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(2)

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

Welbon A. DeLon

Petitioner,

v.

The News and Observer Publishing Company Of Raleigh, North Carolina, a McClatchy Newspaper

Respondent,

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Welbon A. DeLon
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QUESTIONS PRESENTED

1. WHETHER COURTS DECIDED INCORRECT AFRICAN-AMERICAN CONTRACT IMPAIRMENT FROM A COMPANY IS NATIONAL ORIGIN DISCRIMINATION IS NOT COGNIZABLE UNDER SECTION 1981?

2. WHETHER CORRECT A STATE COURT DECISION IS RULE OF DECISION IN CIVIL ACTIONS IN FEDERAL COURTS IN PURSUANT TO 28 U.S.C. SECTIONS 1652?

3. WHETHER SECTION 1981 AMENDED 1991 ACT ARISES WHEN A PERSON IS TREATED DIFFERENT THAN ITS OTHERS IN SIMILAR-SITUATION IN CONTRACT THAT CAUSES PERSON INJURIES?

4. WHETHER COURTS CORRECT NATIONAL ORIGIN DISCRIMINATION AND RETALIATION ARE NOT COGNIZABLE UNDER SECTION 1981 AS IS AMENDED 1991 ACT?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceeding other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner Welbon A. DeLon makes the following disclosure:

Petitioner has zero % holdings.

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INTRODUCTORY PRAYER

The Petitioner respectfully request that a writ of *certiorari* be granted to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 10, 2008.

OPINIONS BELOW

Lower Court Decisions and Orders

United States Court of Appeals for the Fourth Circuit, Order Denying Rehearing, Case No. 08 – 1203, filed June 10, 2008.

United States Court of Appeals for the Fourth Circuit, Unpublished Opinion, Case No. 08 – 1203, filed May 6, 2008.

United States District Court for the Middle District of North Carolina, Greensboro Division, District Court Order 1:05CV259, filed January 22, 2008 and Order and Recommendation, filed November 5, 2007.

United States District Court for the Middle District of North Carolina, Greensboro Division, Order 1:05CV259, filed June 14, 2007.

United States Court of Appeals for the Fourth Circuit, Order Denying Appeal of the Title VII, Case No. 06 – 1936 Order, filed February 15, 2007.

United States District Court for the Middle District of North Carolina, Greensboro Division Court Order 1:05CV259, filed May 15, 2006.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on May 6, 2008. A timely Request for Rehearing was denied on June 10, 2008. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. WHETHER COURTS DECIDED INCORRECTAFRICAN-AMERICAN CONTRACT IMPAIRMENT FROM A COMPANY IS NATIONAL ORIGIN DISCRIMINATION IS NOT COGNIZABLE UNDER SEC. 1981?

Courts characterizes an African-American [Petitioner's race] as a foreign born race in America that his race [a]ll persons is not the same as is "Runyon" within the jurisdiction of the United States Sec. 1981 does not apply your race *is African-American historical ancestry from white America Slavery, is a foreign born race you are National Origin,* Courts.

Courts decide Petitioner Cause of Action is not actionable because "Retaliation Discrimination Complaint Claim is not as [a]ll persons"; ***"because Plaintiff was not Indian – fail as a matter of law, such claims are not cognizable under Sec. 1981.***

Courts Petitioner case is you are not Indian (India) such a claim is not cognizable under the law Sec. 1981 because you are foreign born is national origin discrimination.

Courts conclusion Petitioner's race is a national origin race is conjecture superficial reasoning that under the law Sec. 1981 in "Runyon" a Court decide a

black American do not have equal rights protections in the United States.

Courts such as is here "*an African-American a people's race*" is foreign born is surreal denies the Petitioner to have his constitutional equal rights a Court decide national origin discrimination. Section 1981 amended 1991 Act do apply as is to enjoy same as white citizen within the jurisdiction of the United State, Courts concluded what is an unreasonable decision whether or not if it's unpublished or not it is pre-judicial in Courts of laws.

Pandya Defendant's official actor all of suddenly has retired from News & Observer and left the jurisdiction of the United States after his 22 years here with News & Observer an *alien*, he confesses in 2007 for the Defendant move for *Summary Judgment* that his citizenship is India and thereof the Courts grants Defendant its move for Summary Judgment with prejudice against the Plaintiff Courts decide your claim as such you are not Indian is *national origin* discrimination your cause

of action is not actionable in the United States Court System.

Courts your Cause for justice is deprived of because national origin discrimination is not a cause of action claim and retaliation termination are not cognizable under the Sec. 1981.

The Company had created its own "*Respondeat Superior*" when an employer establishes a Respondeat Superior in employment it has created an employer – employee relationship it employee's wrongful acts in that employment the company is liable for its employees act against a person tort injuries in the course of that employment is without race identity.

A Company employment *Respondeat Superior* deprived a person protected activity in contract in 2003 a tend that deprive equal opportunities in a person contractual employment that resulted retaliation termination in 2004 after the company had failed to save a person from harm Sec.1981(b).

The law is clear *"[a]ll persons" have* equal protection of all laws under the Act of 1991 that all persons are in entitlement equal rights same as is enjoyed by white citizens within the jurisdictions of the United States of America.

To make and to enforce a person contract or employment equal rights not to be adversely affected in contract or employment that is not to be deprived of equal opportunities or otherwise adversely affect a person's status as in employment as is under Title VII and in contract as is Section 1981 as is amended 1991 Act.

Petitioner's filed his lawsuit in 2005 for his contractual protection that of his protected activity in contract of 2003, the Company's retaliatory termination in 2004. That of Petitioner protected activity actions in contract against the Company Official Actor District Sales Manager Manoj Pandya Petitioner's overseer from 1992 – 2004 the Title VII Claim.

Petitioners filed sue on the Section 1981 was to protect his protected activity of 2003 against the company official actors Mr. Manoj Pandya and Mr. Bill Smith because of the Company's failure to provide proper provisional assistance to protect a person constitutional right to be free from discrimination in the workplace from 2001 to 2004.

The Petitioner unprotected equal rights with employer's refusal to protect a person contract make for more than 10 years than retaliated terminated his impaired unenforceable legal 1988 voided contractual agreement that treated a black American different than others in similar situations in 2004.

The Company treated a person contract more like the company employee under its Respondeat Superior from it official actors favoritism caused Petitioner's employment a person tort harm by its managers within the scope of the company employment violated its own well-established policy that allowed discrimination treatment for over 10 years against a person independent

contract that treated his contract different than its others similarly situated.

The Petitioner admission in Court two documents as substantial direct evidence to support his allegations as his undisputable relevant substantial material facts proof that Defendant should be held responsible for its violations against a person's protected activity in contract.

Those documents was the Petitioner contractual agreement of 1988 and his State Court of Appeal 2004 rule of decision that show the Company employment practice was its own employment as its *Respondeat Superior* that adverse affect all its independent contract holders that Petitioner protected activity of 2003 related to that decision his contractual was impaired that his promised contract was not an independent contractor's business that his 2003 contract complaint he was retaliated against by the Company's District Sales Managers.

The African-American sued in the U. S. District Court for his Constitutional equal civil rights protection his statutory right to make and to enforce a person's entitlement in contract to protect his Contract Complaint of 2003 Plaintiff had alleged Bill Smith (white) and Manoj Pandya (Indian) along with their supervisor Mr. Oscar G. (Jerry) Harris had retaliated against his 2003 contract complaint forced an constructive discharge, the Company retaliation termination.

District Court decided that the Pro Se discrimination retaliation complaint is not of law because it is not under the law Sec. 1981 that Petitioner is somehow a foreign born [only] in District Court even after the Plaintiff disputed with he's a natural born citizen of North Carolina.

Furthermore, the Courts decided such a claim as yours you are not Indian is national origin discrimination is not cognizable under the law Sec. 1981.

Petitioner objected in Court that the Defendant had not defended Plaintiff's

1981 Complaint that of senior district sales manager Bill Smith (white) and that of Manoj Pandya (Indian) wrong acts Defendant did not defend his Complaint.

The 2003 contract complaint that of his 1981 Claim the pro se protected equal rights Sec. 1981(a) to sue in Court after the employer refused to protect a person's protected activity in 2003.

Fourth Circuit denied the Title VII appeal that it was interlocutory to the Sec. 1981 than required Plaintiff to pay his filing fees again for this filing on the Sec. 1981 is twice for one filing to the Fourth Circuit show that the maybe the District Court did not decide Petitioner was a interlocutory *Case*?

District Court Judges that presided over the Petitioner Case herein were the Father and Son for the same Magistrate Judge they all each ruled the same with the Father on the Title VII Claim and the Son on the Section 1981 Claim same One Case was they all issued identifiable Orders dismissing Petitioner employment discrimination complaint at summary

judgment with prejudice either recues themselves the appearance conflicts with 28 U.S.C. Sec. 455(a), (b) 1, 4, and 5.

> **The Courts decided, "Plaintiff's claims of national origin discrimination – that Pandya harassed him or imposed undue burdens on him or favored others because Plaintiff was not Indian – fail as a matter of law, as such claims are not cognizable under Sec. 1981. *Jadali v. Alamance Reg'l Med. Ctr.*, 399 F. Supp. 2d 675, 682 (M.D.N.C. 2005), *aff'd*, 167 Fed. Appx. 961 (4th Cir. 2006) (holding plaintiff who alleged he was denied additional medical privileges because he was *"foreign born"* failed to state claim under Section 1981."**

Therein conflict with the laws of the land because the Petitioner is by rule of law an *natural born citizen in America* he is protected under the laws of the land within the United States of America's Constitution its 14th Amendment ". . .

any person within the jurisdiction the Equal Protection of the laws".

Petitioner 1981 claim was the in 2003 protected activity to that he presented proffered his direct evidence was a substantial material fact genuine issue material fact his self witnessed for over 16 years hoping things would finally pan out that he would have his equal right to be his contract an independent *Dealer* as the promise his Contract legal equal rights his 1988 Agreement promised.

Employer practice appeared was to protect itself from liability that is until 2004 a body of law decided the preventive means were only a shield finally uncovered by a state court declared the employer contractual method is a void unconscionable agreement because it had created its own employment under its own *"Respondeat Superior"*.

District Court misconstrued a pro se Discrimination Complaint Plaintiff's Race is not a foreign born, race, he is of America his race is protected under the United States Civil Rights Act of 1866 that of 1964 Act, and 1991 Act a person of ancestral history in America such as is an

African-American in the United States is a "Natural Born Citizen" and violations of his equal rights are protected as is all persons.

Courts decision Conflict with other Circuit Courts that where Petitioner's race is supposed to have been a foreign born because he's a descendant of African-America heritage from America white slavery is a national origin person "*Berg v. Obama*, No. 08-4340 (3rd Cir. 2008)" holding the court below correctly dismissed his action, holding, inter alia, that Berg lacks standing under Article III. The allegation was that Mr. Obama was a foreign born therefore he was ineligible to run for President of the United States that he was not a "natural born" citizen.

Sec. 1981(b) . . . "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; Fourth Circuit Court of Appeals' Unpublished Opinion Conflicts with other Ciruits *"Bains LLC v. ARCO Products Co.*, No. 02-35993, (9th Cir. 2005)" and (in *"CBOCS West, Inc., v.*

Hedrick G. Humphries, S. Ct., No. 061431, (7th Cir. 2007)."

African-American Discrimination is a person Race Discrimination in 2003 and his Retaliation Termination in 2004 terminated a person contract in a protected activity violation, all persons are protected in Courts under the law Section 1981(b); from a wrongful employer practice that unfairly limit, segregated and deprived a person to have contractual rights in its creation of it Respondeat Superior created an unsafe work environment.

Sec. 1981 (b) . . . permits [a]ll person's to have protected activity is a statutorily protected right under the law Sec. 1981(a) . . . to sue in Federal Court to protect a person right to make and to enforce their make even after termination Sec. 1981(b) that which under Sec. 1981(c) . . . is within 28 U.S.C. Sec. 1658 limit of statute of limitation under the protection of the Congressional Acts of Law.

Under the U.S. Constitution 14th Amendment at ". . . *nor deny to any person within its jurisdiction the equal protection of the laws.*

In 2004 North Carolina's Court of Appeal concluded News & Observer employer practice of it independent contract for its newspaper-carriers was not a independent contractor's business that ruling is protected in Federal Courts under statutory law 28 U.C.S. § 1652; that in *Johnson v. News & Observer*[1] holding its independent contract with its newspaper carriers was not a matter of law the contract is void the State Court ruled that the North Carolina Employer of its Newspaper Carriers that Employment created a "*Respondeat Superior*" a Employer – Employee Relationship.

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[1] The Court stated that "[O]rdinarily, the day by day sale and delivery of newspapers under a cancellable agreement of indefinite duration may not be considered "a specific job under contract" within the meaning of that phrase when used in defining an independent contractor". Id, Considering several of the present case, we cannot conclude that Roberts was an independent contractor as matter of law.

Therefore under such the Company is has liability for it Newspaper Carrier Automobile Accident on public roads under its own employer practice for its employees wrongs within the scope of its employment, that the newspaper carrier contract was not a independent contractor agreement meant it was void contractual agreement. The Corporate Order is replace all newspaper contracts to be completed by April 1, 2004 this of the Defendant's admission that which adversely affected the Petitioner because of his protected activity of 2003.

1. WHETHER CORRECT A STATE COURT DECISION IS RULE OF DECISION IN CIVIL ACTIONS IN FEDERAL COURTS IN PURSUANT TO 28 U.S.C. SECTIONS 1652?

A COMPANY NEWS & OBSERVER NEWSPAPER COMPANY A STATE COURT OF APPEAL HELD IT VIOLATED STATE EMPLOYMENT CONTRACT LAWS DECIDED ITS INDEPENDENT CONTRACTORS EMPLOYMENT WAS NOT AS MATTER OF LAW IN NORTH CAROLINA IN 2003.

In Federal Court is decided you are a independent contractor and your impaired contract Cause does not apply and retaliation termination is not cognizable and such a claim you are not Indian is not actionable because national origin discrimination is not cognizable under the law Sec. 1981.

Petitioner's 1988 contract "Dealer Sales Agreement" his equal protection to make and to enforce was a supposedly self-employment business opportunity required $2,000.00 for deposit under a specific company agreed stipulation to have wholesale purchase rights (credit).

That all changed after Mr. Manoj Pandya's became Petitioner's District Sales [M]anager in 1992 his favoritism took shape in 1994 for his new hire Mr. Biplin Shukla a person of his same ethnicity background; Pandya's performed unwelcome harassment against his employer's independent contract holder Pandya misconduct in 1993 he (Petitioner) reported this to Mr. Jim

Puryear in 1993 was to the company and again in 1994 a repeatedly reoccurrence for over 10 years again to Mr. Smith in 2003 about how his demand was what had happen over those 10 years that I was unable to perform like the employee that I've now been injured I was against having to perform more like of the same type of discrimination in contract that I was now disabled from such employment practice the results is a retaliation constructive termination by the Company on March 31, 2004.

"The company violated its own well-established policy that allowed a different treatment toward it African-American person than its others similarly situated whites and non-whites is a violation under the law Section 1981, 1982 and Title VII as amended the Civil Rights Act 1991."

"We hold that 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, provides a claim against private discrimination on basis of Alienates. *Anderson v. Conboy*, (Doc. No. 97-7677)(2nd Cir. 1998).

"News & Observer" defended in 2003 in State Court with a pretext all its newspaper contractors are employed as its Independent Contractors [temporary work] they all are at-will employed, but the North Carolina Court of Appeal fact-finding concluded that fact was not true; this in 2005 Case, the same defense the same Defendant defended with in Federal Court that of the 2003 same defense is in Federal Court Plaintiff's relevant genuine issue of material facts proffered material fact evidence was is Petitioner's direct evidence disputed in a dispositive material fact presented a prima facie case that the Courts overlooked or would not acknowledge his Petitioner's state public policy contract law make in 2004.

Section 1981 under "Runyon and Sullivan" Petitioner's Cause of Action is actionable within the Jurisdiction of the United States the United States *Constitution* does not favor any kind of discrimination against a person's protected civil rights neither under any illusionary contractual that allowed race

favoritism is discrimination a unlawful under the law Sec. 1981 amend 1991 Act.

REASONS FOR GRANTING THE PETITION

II. WHETHER SECTION 1981 AMENDED 1991 ACT ARISES WHEN A PERSON IS TREATED DIFFERENT THAN ITS OTHERS IN A SIMILAR-SITUATION IN CONTRACT THAT CAUSES PERSON INJURIES?

The *entirety* of the Sec. 1981 as is amended the 1991 Act it statement is race does not determine the cause of action as is the primary factor only states *Equal Rights* under the Law: *"as is enjoyed by white citizens" all persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue . . . to the full and equal benefit of all laws....*

Johnson v. News & Observer is published in 2004 North Carolina State Court of Appeal; reversing, cited case law

from its State Supreme Court holding that "News & Observer's newspaper-carrier as its independent contractors is a void independent contractor's agreement the contractual as is, is a quasi-contract.

Because the employer's practice had established its own "*Respondent Superior*" created "an employer – employee relationship within its employment itself the company employer's practice is not of law in North Carolina". "*Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005) holding "at summary judgment plaintiff need only raise a material issue of fact as to the believability of the employer's justification. Plaintiff need not also provide evidence of discriminatory motive."

The Court ruled the newspaper-carrier's automobile accident was the result of the company's employment performed within the scope of the employer's employment while making newspaper deliveries of the Company's newspapers he caused an automobile

accident on public roads under a state jurisdiction another human being sustained injuries State Court ruled the Company was liable for what essentially its employee wrong act.

In 2003 Smith and Pandya the Company managers its official actors[2] violated company it own well-established policy that treated a person [American] contract different than its others similarly - situated.

The Petitioner was his forced to perform more like its employee without his full and equal benefits of his contract the part-time hourly contract, his by the company's official actors [management] a person contract was required to perform fulltime hourly in-kind like its own employees a different treatment than it others similarly situated is defined in "*Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004) in *Ellerth*, 524 U.S. at 781 . . . "Official acts" include the acts

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[2] The independent contractor is required to have a specific company overseer manager named by the Company then that contract a person is placed into that manager person's imputed knowledge its district sales manager's territory authority the employment terms and conditions done assigned by the Company business necessities.

included in the *Ellerth* description of a tangible employment status, such as . . . significantly change in benefits".

African-American his inability to make and to enforce his legal protection because of the company allowed for unprotected contractual interferences that impaired a person contract against under the law. Defendant claim is Petitioner was his own self-governing business and that of the Courts you are a former Independent Contractor.

Court decides your claim is you are not Indian such claims are not cognizable under the law Sec. 1981 conflict with another Circuit holding a Company is a person under Sec. 1981 *"Bains LLC v. ARCO Products Co.*, No. 02-35993, (9th Cir. 2005), "Flying B undoubtedly acquired an imputed racial identity, and its allegation that its contract with ARCO was terminated due to the effects of racial discrimination clearly gives it standing to pursue a Sec. 1981 claim against ARCO"."

Petitioner's 1988 contract on it face understand writing this is for a "Dealer Sales Agreement" . . . that hereinafter is called "*Dealer*"; that all changed after district sales manager discrimination favoritism started for his new hire in 1994 person of his same ethnic race affected my contract because he rearranged my contractual area and obligation to suit his person a better opportunity made for the African-American a different treatment for over 10years impaired made a person contractual unenforceable Petitioners 2003 protected activity result with his manager Pandya malice threat on or about February 25, 2004 retaliation termination notice on or about March 2, 2004.

Courts decision conflicts with another Circuit "*CBOCS WEST, INC. v. HUMPHRIES*, No. 06-1431 decided May 27, 2008, U. S. Supreme Court, Held: Section 1981 encompasses retaliation claims."

"*McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (5th Cir. 1976) held at

"2. Section 1981 prohibits racial discrimination in private employment against white persons as well as nonwhites, and this conclusion is supported both be the statute's language, which explicitly applies to "all persons," and by its legislative history."

"Section 1981 allows hostile-environment suits by independent contractors, base on the race of the employee or other person who was harassed. The Court noted that Section 1981 does not distinguish between employment contracts and other types of Contracts." *"Danco, Inc., v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 10-11(1st Cir. 1999), Cert. denied, 528 U.S. 1105 (2000).

In District Court Petitioner proffer of his evidence that there did exist genuine issue of material fact as his substantial direct evidence the fact-findings by his N.C. State Court that decision is protected in federal courts *28 U.S.C. § 1652* in "Johnson v. News & Observer" was a state public policy independent

contract employment law make was his preponderance of the evidence proof that his contractual employment was not a independent contractor relationship with the News & Observer, and the Defendant did not defend.

The Fourth Circuit Court of Appeals' Unpublished Memorandum Opinion of May 6, 2008 is a ". . . position is inconsistent with the standard for summary judgment set forth in Rule 56(c) which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)".

McDonnell Douglas, 411 U.S. at 802. The plaintiff may meet this burden by showing (1) that the stated reasons had no basis in fact, (2) that the stated

reasons were not the actual reasons, or (3) that the stated reasons were insufficient to explain the employer's action.

"Johnson v. The News & Observer" COA03-1386 (N.C.2004), Summary Judgment should not have been granted for defendant-newspapers on the issue of vicarious liability in an action arising from a newspaper carrier's automobile accident. It can not be concluded, as a matter of law, that the carrier was an independent contractor . . . etc."

Equal Employment Opportunity Commission(EEOC) that to Petitioner's on or about May 6, 2004 who traveled from Chapel Hill to Raleigh, N.C. to file his charge under oath his Questionnaire was given it EEOC file number but EEOC official would did not process his discrimination and retaliation complaint to the employer until December 7, 2004 ("*Federal Express Corp., v. Holowecki*, No. 06-1322, 128 S. Ct., 1147 (Feb. 27,

2008)"[3] because its officials believed all newspaper-carriers, they stated; you are a newspaper carrier we can not process your independent contractor's at-will employment contract EEOC is prohibited by law from investigating your discrimination retaliation claims as a newspaper carrier you are not protected by EEOC.

"*Lauture v. International Bus. Machs. Corp.*, 216 F. 3d 258 (2nd Cir. 2000) In reversing, the Second Circuit cited case law from other circuits holding that at-will employee may sue for wrongful discharge under Sec. 1981. . . "The Restatement of Contracts defines "contract" as a promise or set of promises for the breach of which the law gives a

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[3] "(e) FedEx's view that because the EEOC must act "[u]pon receiving ... a charge, " 29 U.S. Sec. 626(d), its failure to do so means the filing is not a charge, is rejected as too artificial a reading of the ADEA. The statute requires the aggrieved individual to file a charge before filing a lawsuit; it does not condition the individual's right to sue upon the agency taking any action. Cf. Edelman v. Lynchburg College, 535 U.S. 106. Moreover, because the filing of a charge determines when the ADEA's time limits and procedural mechanisms commence, it would be illogical and impractical to make the definition of charge dependent upon a condition subsequent over which the parities have no control. Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422. Pp. 12-13."

remedy, or the performance of which the law in some way recognizes as a duty." Thus, the Court held, the absence of an employment contract for a fixed term should not bar plaintiff from pursuing a 1981 claim".

Such as identified in a N.C. Court of Appeal published its holding "Under the doctrine of respondeat superior, an employer can be held vicariously liable for a worker's negligence when an employer – relationship exists. *"Gordon v. Garner*, 127 N.C. App.649, 658, 493, S.E. 2d 58, 63 N.C. 670,500 S.E. 2d 86(1998)."

The misconduct of its employee manager's result Petitioner tort injuries permanent nerve damage impairment in contract lost of his contractual equal right from an Company unprotected contract that allowed for retaliation discrimination the company retaliatory constructive discharge in 2004.

The Company's 2004 official actor's retaliation termination of his contract resulted to more serious medical health

cost and defaults on his family mortgage and other serious financial harms for an unemployed disabled from 16 years of dishonest employment for a person over 40years old in 1988 and now near 65years old with his permanent nerve damages after having to perform without his full and equal benefits of all laws disabled by News & Observer's wrong employer's practices in employment and in contract.

Pandya's and Smith's his manager-supervisor Mr. Jerry (Oscars G.) Harris on or about January 7, 2004 photocopy memo was hand delivered by the same person who the Petitioner complained to in his protected activity in June 2003 was to protect against race discrimination that which senior district sales manager Bill Smith in 2003 and Mr. Pandya in 2001, concerning Ms Laura Upton's contractual territory work duties being push onto the African-American their wrongful acts and their Chapel Hill, N.C. [d]istrict manager's supervisor Mr. Harris's letter of January 7, 2004.

The Company business necessities employer's wrongs its non-independent

contract practice and it unlawful discrimination practice its refusal to abide by his state employment contract public policy laws. N.C. public policy is law in employment is an exception rule state that of *"at-will employment"* is protected against discrimination or wrongful discharge.

The Defendant admission in court record the Petitioner was the only newspaper person terminated with that memorandum from Mr. Harris's District Chapel Hill, N.C. were three district sales managers each maintain separate teams of workers under Mr. Harris supervision and management.

"Section 1981(c) Protection against impairment; the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law."

The Petitioner auto accident in 2002 was due to Pandya's hostile work environment his misconduct unwelcome harassments the over burden workload resulted a person tort injuries his

permanent employment disability for the rest of his life, Plaintiff's admission in Court in 2005 from a medical doctor expert. *"Domino's Pizza Inc., et al., v. McDonald,* 546 U. S. (9th Cir. 2006) "Any claim brought under Sec. 1981 . . . must initially identify an impaired "contractual relationship", Sec. 1981(b) under which the plaintiff has rights".

"Goodman v. Lukens Steels Co., 482 U.S. 656, 661 (1987) (suggesting that Section 1981 sounds in tort because racial discrimination is a "fundamental injury to the individual rights of a person").

Petitioner's 2005 Discrimination Complaint was timely filed under the law 28 U.S.C. § 1658 his Section 1981 Claim and his Title VII Claim was within 180 days limitation rule all are his equal rights to have protected activity against the unlawful discrimination in contract. *"Johnson* v. *News & Observer Publishing Co., the McClatchy Company & McClatchy Newspapers,* COA03-1386 (2004)" Held "Applying the Hayes factors, our Supreme Court have found that newspaper carriers

typically do not exercise a sufficient degree of control over their work to be considered independent contractors as a matter of law". *Cooper v. Publishing Co.*, 258 N.C. 578, 589, 129 S.E. 2d 107, 115 (1963).

In 2004 Petitioner his district sales [m]anager Manoj Pandya continual fire and malice threat on or about February 25, 2004 and his supervisor Mr. Oscar G. (Jerry) Harris' the January 7, 2004 photocopy memo provided a cover for the Company claims it was a company-wide termination in 2007 after its admission in Court it only terminated the African-American with the Defendant pretext it was DeLon own fault. "*You*" are not the Company Employee you cannot file an Equal Employment Opportunity Compliant with EEOC in 1994 and 2003.

"*Zirkle v. Winkler*, et al. (No. 30787) W. Va., S.C.A. (May 2003)" decided "Huntington Publishing, we stated that the newspaper company's ability to release a carrier [without a stated reason] effectively controls the carrier's method of operation. The right to fire is

one of the most effective methods of control. *"Cooper v. Asheville Citizen-Times Publishing Co.*, Inc., 258 N.C. 578, 129 S.E. 2d 107, at 115(1963), 180 W.Va. at 491, 377 S.E. 2d at 483."

"Hawkins v. 1115 Legal Service, (2nd Cir. 1998) Holding Section 1981 provides right to sue on claim that employer retaliated against employee for filing a complaint of racial discrimination, whether or not the retaliation itself was racially motivated". And, "Harassment by high level supervisors is imputed to the employer as a matter of vicarious liability. *Haugerud v. Amery Sch. Dist.* 259 F.3d 345 (7th Cir. 2001)."

"Under *"Runyon"* in *McDonald* "we made this clear in *"Runyon v. McCrary,* 427 U.S. 160 (1976) which subject defendants to liability under Sec. 1981 when, for racially-motivated reasons, they prevented individuals who "sought to enter into contractual relationship" from doing so. *Id.*, at 172 (emphasis added)."

Courts incorrect decided *Petitioner's* <u>*race*</u> *is a foreign born race* [<u>a person's</u>

African-American ancestry is not a natural born citizen in America] his contract rights are not protected under the law Sec. 1981. Courts decides since your claim is an national origin discrimination and retaliation *Complaint you are not protected as is a* Cause of Action its not actionable in Federal Courts because such a Claim you are not Indian is not cognizable under the law Sec. 1981. Conflicts with another Circuit Court; *"Anderson v. Conboy"*, (Doc. No. 97-7677) (2nd Cir. 1998) Held; a person is under the law protection at Section 1981 prohibition against racial discrimination encompasses discrimination based on ancestry or ethnic characteristics when a person contract is terminated § 1981(b) as amended 1991.

District Court February 26, 2007 Sec. 1981 dismissal hearing in court from the bench granted the Defendant's lawyer oral request for a corporate person to be present in the pro se deposition.

Respondent's oral request the Court's Bench warned the lawyer it must be an corporate representative not an employee

what followed appearance was a set-up a plan an deceptive plan for Defendant's purposeful act was not an corporate person present prejudiced the pro se deposition that person was its own employee Mr. James D. Puryear; present the whole time and exchanging notes with the Defendant lawyer while deposing the pro se person.

Set the stage for its summary judgment move with hearsay evidence following a Court Order compulsion in deposition that prejudiced the pro se Case his 1993 to 2004 Title VII Cause from the company employees testimony was based on their hearsay testimonial evidenced by those of Petitioner's Case involvement in his complaint about their own misconduct was to the Company in his Complaint herein their employment position over the contract that his state had already declared was not an independent contractor – relationship which they themselves managed the retention controls.

Mr. Puryear was the company Metro Manager in 1993; he had a conflict of interest as a high lever Company

employee surrounding the facts of the pro se case. Petitioner objected before the started his depose (the pro se) that of Mr. Puryear being present he was a company employee not the corporate person this was an unfair deposition.

Mr. Puryear and his subordinates stated one after the other in 2007 three statements that reflected the same were for their employer's Defendant movant for *summary judgment* as their true and correct statement was that Plaintiff signs on was an independent contractor – relationship with the News & Observer. "*Palmer v. Hoffman,* 318 U.S. Ct. S., 109 No. 300, (1943)"held . . . essentially decided a record is hearsay unless it is based on its official records of its business."

The Company had agued its business necessity is making newspapers it was not the Plaintiff's employment purpose his purported independent contract proposal was self-employment that aim is not the company's official records of its business; Defendant's augment is Plaintiff's contract posited you are not as

an employee of the News & Observer Newspaper Publishing Company.

Mr. Pandya unsworn declaration was written executed outside the United States is without verification of signature or notary is without law as is required under 28 U.S.C. Sec. 1746. Moreover the law is clear admissible evidence is to be above unfairly prejudicial or based on hearsay.

CONCLUSION

The strong interest in protecting individual's rights against the unlawful discrimination, interference impairment in contract – employment, and the importance of equal protection of all laws to secure a person's civil rights to make and to enforce a person's contract equally as all United States Citizens are in entitlement.

Respectfully submitted,

Welbon A. DeLon
250 S. Estes Drive 13
Chapel Hill, N.C. 27514
(919) 338-2887

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT FOURTEENTH

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES
42 U.S.C.

Section 1981. Equal rights under the law

(a) Statement of equal rights "all persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit

of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

(b) "Make and enforce contract" defined, For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

Section 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any

grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror, or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United deprived may have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 2000e – 2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of his employment, because of such individual's

race, color, religion, sex, or national origin.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee his, because of such individual's race, color, religion, sex, or national origin.

FILED: June 10, 2008

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 08-1203
(1:05-cv-00259-WO-PTS

Welbon A. DeLon,
Plaintiff – Appellant

v.

The News and Observer Publishing Company of Raleigh, North Carolina, a McClatchy Newspaper,
Defendant – Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge Motz.

For the Court
/s/ Patricia S. Connor,
Clerk

FILED May 6, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1203
(1:05-cv-00259-WO-PTS)

WELBON A. DELON,

Plaintiff - Appellant

v.

THE NEWS AND OBSERVER PUBLISHING COMPANY OF RALEIGH, NORTH CAROLINA, A McClatchy Newspaper,

Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/S/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1203

WELBON A. DELON,
Plaintiff - Appellant,

v.

THE NEWS AND OBSERVER PUBLISHING COMPANY; OF RALEIGH, NORTH CAROLINA, A McClatchy Newspaper,

Defendant - Appellee,

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, Jr., District Judge. (1: 05 – cv-00259-WO-PTS)

Submitted: April 23, 2008
Decided: May 6, 2008

Before Wilkinson, Niemeyer, and Motz, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Welbon A. DeLon, Appellant Pro Se. Robert E. Harrington, Angelique Regail Vincent, ROBINSON,

BRADSHAW & HINSON, PA, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this Circuit.

PER CURIAM:

Welbon A. DeLon appeals the district court's orders accepting the recommendation of the magistrate judge and dismissing his employment discrimination complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. DeLon v. The News & Observer Publishing, No. 1:05-cv-00259-WO-PTS (M. D. N. C. Jan. 22, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WELBON A. DELON,
Plaintiff,

v. **1:05CV00259**

THE NEWS AND OBSERVER PUBLISHING COMPANY OF RALEIGH, NORTH CAROLINA, A McClatchy Newspaper,

Defendant,

ORDER

OSTEEN, District Judge

In this Standing Order 30 proceeding, the Magistrate Judge has recommended that Defendant's Motion for Summary Judgment be granted and that this case be dismissed with prejudice. Plaintiff filed a timely

objection to the recommendation. Defendant filed a response to Plaintiff's objection and Plaintiff filed a reply to Defendant's response.

This court has conducted a review of the file and has determined that the recommendation of the Magistrate Judge is appropriate and should be adopted.

For the reasons set forth in the Magistrate Judge's recommendation of November 5, 2007.

IT IS ORDERED that Defendant's Motion for Summary Judgment (Doc. No. 53) is **GRANTED** and that Plaintiff's case is dismissed with prejudice.

This 22nd day of January 2008.

/S/ WILLIAM L. OSTEEN, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WELBON A. DELON,
Plaintiff,

v. **1:05CV259**

THE NEWS AND OBSERVER PUBLISHING COMPANY OF RALEIGH, NORTH CAROLINA, a McClatchy Newspaper,

Defendant,

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the motion for summary judgment filed by Defendant the News and Observer Publishing Company of Raleigh, North Carolina, a McClatchy Newspaper ("News & Observer"). (Pleading No. 53.) Plaintiff Welbon A. DeLon has opposed the motion. (Pleading No. 62.) The News & Observer has replied. (Pleading No. 65.) The motion is ready for a ruling.

Procedural History

Plaintiff Welbon A. DeLon is a former independent contractor who delivered newspapers for the News & Observer in Chapel Hill for almost 16 years – from April 9, 1988 until his contract terminated on March 31, 2004. In January 2004, the News & Observer implemented a new independent contractor agreement for its carriers newspaper-wide. Plaintiff DeLon was the only independent contractor in his district to refuse to sign the new agreement. His contract terminated effective March 31, 2004. In response, on March 23, 2005, DeLon filed this lawsuit *pro se*, relying on Title VII of the Civil Rights Act of 1964, as amended ("Title VII") and 42 U. S. C. § 1981, alleging national origin and race discrimination between 1992 and 2004. (Pleading No. 2, Complaint ("Compl."); Pleading No. 58, Deposition of Welbon A. DeLon ("DeLon Dep.") at 129, 181-83, Ex. 8.)

Plaintiff alleges harassment by his supervisor and district manager, Manoj Pandya, including attempts by Pandya to make Plaintiff quit his job. (Compl. at 10.) Plaintiff also aglleges

that Pandya, who is from India, favored individuals of Indian origin and discriminated against Plaintiff based on Plaintiff's status as a light-skinned African American. (Id. at 3, 5.) Finally, Plaintiff alleges that the News & Observer instituted the new independent contractor agreement and terminated his preexisting agreement in 2004 in retaliation for various complaints he had made in the past, including in 1992, 1994, 1998 and 2000. (Id. at 8-10.)

By Order entered on July 28, 2006, United States District Judge William L. Osteen adopted the recommendation of this Magistrate Judge that Plaintiff's Title VII claims be dismissed based upon Plaintiff's failure to file a timely charge of discrimination with the EEOC. The only claim remaining in the case is Plaintiff's claim pursuant to 42 U. S. C. § 1981.

The News & Observer now moves for summary judgment on Plaintiff's Section 1981 claim. Plaintiff has opposed the motion.

Statement of Facts

In September 1987, Plaintiff DeLon began part-time employment with the News & Observer selling newspaper subscriptions. In March 1988, the News & Observer offered him a dealership under which he would become a self-employed newspaper carrier. (DeLon Dep. At 66-68.) Consistent with common business practice in the newspaper industry, the News & Observer engages independent contractors to deliver newspapers on assigned routes throughout its delivery area. (Pleading No. 55, Affidavit of James D. Puryear ("Puryear Aff.") ¶ 7). Plaintiff accepted, and began working as an independent contractor newspaper carrier at the News & Observer's Chapel Hill distribution center. (DeLon Dep. At 68; Puryear Aff. ¶ 9.) The terms of the independent contractor relationship were governed by a "Dealership Sales Agreement" dated April 4, 1988. (DeLon Dep. at 69-70, Ex. 1; Puryear Aff. ¶ 9, Ex. A.)

The Chapel Hill distribution center has approximately 37 paper

routes and has been subdivided into three districts, the "DF," "DI" and "DW" districts. (Puryear Aff. ¶¶ 11, 14; Pleading No. 56, Affidavit of Oscar G. Harris, Jr. ("Harris Aff.") ¶ 8.) Each route is assigned to one of the three districts, and each district contains between 12 and 17 routes and a corresponding number of independent contract carriers for the routes. (Puryear Aff. ¶ 11.) The News & Observer assigns a district manager to oversee the general operations of each district. The manager is responsible for filling the paper routes in his or her district and negotiating the independent contractor agreements with the newspaper carriers. (Puryear Aff. ¶ 13; Harris Aff. ¶ 9.) Between 1991 and 2004, Manoj Pandya served as the district manager for the "DF" district, which encompassed Plaintiff's route. (DeLon Dep. at 83; Pleading No. 57, Declaration of Manoj Pandya ("Pandya Decl.") ¶¶ 3-4.)

Carriers purchase newspapers from the News & Observer at a wholesale rate negotiated with each carrier. The News & Observer

advances the newspaper to the carrier, and the carrier is responsible for paying for the newspapers within two weeks. (DeLon Dep. at 76; Puryear Aff. ¶ 15; Harris Aff. ¶12.) The newspaper carrier, in turn, sells the papers to customers at the suggested retail rate. (DeLon Dep. at 75-76; Puryear Aff. ¶ 15.) The customers are permitted to send subscription payments to the News & Observer or pay the carrier directly. (DeLon Dep. at 76; Puryear Aff. ¶ 15.) When the News & Observer receives payments from customers, it credits the carrier's account. (DeLon Dep. at 77-78; Puryear Aff. ¶ 16.) A Carrier generally has a credit balance for an applicable billing period if the amount of payments received from the customers exceeds the amount the carrier owes the News & Observer. (DeLon Dep. at 81; Puryear Aff. ¶ 16.) Plaintiff DeLon "always had a [credit] balance" and, indeed, had one of the most profitable routes in the DF

district. (DeLon Dep. at 80; Pandya Decl. ¶ 13; Puryear Aff. ¶¶ 23, 25, 27.)

In January 2004, the News & Observer implemented a new agreement for its newspaper carriers. (DeLon Dep. at 96-98; Puryear Aff. ¶ 33; Harris Aff. ¶ 15; Pandya Decl. ¶ 17.) The change applied newspaper-wide and affected all independent contractor newspaper carriers. (DeLon Dep. at 116; Puryear Aff. ¶ 33; Harris Aff. ¶ 15; Pandya Decl. ¶ 17.) The decision to change the contract was based in part on a change in the newspaper's surety bond program and in part on a corporate decision to update the contract. (Puryear Aff. ¶ 35.) In a memorandum to all independent contractors, dated January 1, 2004, the News & Observer wrote:

In accordance with corporate guidelines, effective January 1st, 2004, The News & Observer will implement a new contract for home delivery and

single copy accounts... The current contract will no longer be valid effective April 1st, 2004.

(DeLon Dep. at 96-98, Ex. 3; Puryear Aff. ¶ 33, Ex. C.) The News & Observer provided each home delivery independent contractor, including Plaintiff, with a copy of the new agreement. (DeLon Dep. at 101-04, Ex. 4; Puryear Aff. ¶ 34, Ex. D.)

Pandya discussed the new agreement with Plaintiff on several occasions to answer any questions Plaintiff had and to encourage him to agree to the terms of the new contract. (Pandya Decl. ¶ 19.) Plaintiff characterizes these discussions as "coer[cive]" and alleges that the new agreement was "unfair" because it provided a one-year renewable term for all carriers in spite of the carrier's length of service. (DeLon Dep. at 119-20, 112-13.) Based on Plaintiff's reluctance to sign the new agreement, Pandya and Harris agreed to provide Plaintiff with additional time to

consider the new agreement. (Pandya Decl. ¶ 19; Harris Aff. ¶ 17.) In the meantime, Pandya issued another written notice, dated March 2, 2004, advising that Plaintiff's existing contract would terminate effective March 31, 2004. Pandya continued to advise Plaintiff that he could enter the new agreement. (Pandya Decl. ¶ 21, Ex. E; DeLon Dep. at 146, Ex. 6.) Pandya continued to advise Plaintiff that he could enter the new agreement. (Pandya Decl. ¶ 22.) Pandya sent Plaintiff a third written notice, dated March 29, 2004, reiterating that Plaintiff's last day would be March 31, 2004 unless Plaintiff signed the new agreement. (Pandya Decl. ¶ 23, Ex. F; DeLon Dep. at 153-55, Ex. 7.) Ultimately, Plaintiff chose not to sign the new agreement. (DeLon Dep. at 115; Pandya Decl. ¶ 24.) Plaintiff was the only independent contractor in the Chapel Hill distribution center who elected not to enter into the new

agreement. (Pandya Decl. ¶ 25; Harris Aff . ¶ 21.)

Discussion

The summary judgment standard of review under Rule 56 of the Federal Rules of Civil Procedure is well established. A party is entitled to judgment as a matter of law upon a showing that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56 (c). The material facts are those identified by controlling law as essential elements of claims asserted by the parties. A genuine issue as to such facts exists if the evidence forecast is sufficient for a reasonable trier of fact to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248 (1986). No genuine issue of material fact exists if the nonmoving party fails to make a sufficient showing on an essential element of its case as to which it would have the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In evaluating

a forecast of evidence on summary judgment review, the court must view the facts and inferences reasonably to be drawn from them in the light most favorable to the nonmoving party. Anderson, 477 U.S. at 255.

When the moving party has carried its burden, the non-moving party must come forward with evidence showing more than some "metaphysical doubt" that genuine and material factual issues exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). A mere existence of a scintilla of evidence is insufficient to circumvent summary judgment. Instead, the nonmoving party must convince the court that, upon the record taken as a whole, a rational trier of fact could find for the nonmoving party. Id. at 248-49. If the plaintiff fails to "make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof," then "the plain language of Rule 56(c) mandates

the entry of summary judgment." Celotex Corp. 477 U.S. at 322-23.) Trial is unnecessary if "the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." Mitchell v. Data General Corp., 12 F.3d 1310, 1315-16 (4th Cir. 1993).

Plaintiff's only remaining claim in this action is one brought pursuant to 42 U.S.C. § 1981 provides that "[a]ll persons...shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. "42 U.S.C. § 1981; Runyon v. McCrary, 427 U.S. 160, 168 (1976). As amended by the Civil Rights Act of 1991, Section 1981 (b) provides that the term "make and enforce contracts" includes "the making, performance, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the

contractual relationship." *Id.* As previously noted, Plaintiff alleges that Defendant discriminated and retaliated against him based on his race, in violation of Section 1981. Defendant News & Observer seeks summary judgment on grounds that (1) Plaintiff's national origin and discrimination claims are not cognizable under § 1981; (2) Plaintiff's claims based on alleged events occurring before March 23, 2001 are timed-barred; (3) Plaintiff has failed to establish a *prima facie* case of race (or national origin) discrimination; and (4) Plaintiff was terminated in accordance with his contract when he elected not to enter into the new independent contractor agreement. Plaintiff opposes the motion.

In response to the News & Observer's motion for summary judgment, Plaintiff DeLon has failed to establish any genuine issue of material fact as to any of his remaining Section 1981 claims. Plaintiff offers no

depositions, affidavits or other competent evidence to counter the evidence cited by the News & Observer in support of its motion. Instead, Plaintiff flatly ignores his ultimate burden of proof – to establish that the News & Observer engaged in intentional discrimination, harassment or retaliation – and relies on disjointed argument, unauthenticated and irrelevant documents, and speculation to attempt to survive summary judgment review. Plaintiff points to the following factual disputes and legal arguments in his opposition: that he was not given 30 days' notice of termination; that he attempted to file an EEOC charge in 1994; that he was a "common law employee"; that there was no legal grievance procedure; that he complained to unspecified discrimination in 1993, 1994, 1998, 2000 and 2003; that notice of the new independent contractor agreement was provided by Jerry Harris (not Jerry Ritter) in January

2004; and that he was an employee, not an independent contractor.

None of the factual disputes raised by Plaintiff are material to the determination of whether the News & Observer engaged in intentional, race-based discrimination in the making or enforcement of a contract with Plaintiff. Moreover, Plaintiff's legal argument regarding his status as an employee as opposed to an independent contractor is irrelevant. To the extent that Plaintiff makes the bald assertion that he was treated differently because of his status as a light-skinned African American, he points to no competent evidence to support such a claim. The record conduct in electing not to sign the new contract offered to all carriers.

Even if the Court considered Plaintiff's evidence remotely competent, Plaintiff's claims suffer from other fatal defects. Plaintiff's claims of national origin discrimination – that Pandya harassed

him or imposed undue burdens on him or favored others because Plaintiff was *not* Indian[1] - fail as a matter of law, as such claims are not cognizable under § 1981. *Jadali v. Alamance Reg'l Med. Ctr.*, 399 F. Supp. 2d 675, 682 (M.D.N.C. 2005), *aff'd*, 167 Fed. Appx. 961 (4th Cir. 2006) (holding plaintiff who alleged he was denied additional medical privileges because he was "foreign born" failed to state claim under Section 1981). Under Section 1981, there is no cause of action for national origin discrimination; a plaintiff must allege and prove that the discrimination was *racially* motivated. *See Bogdan v. Housing Auth. Of the City of Winston-Salem*, No. 1:05CV00568, 2006 WL 3848693, *7 (M.D.N.C. Dec. 29, 2006).[2]

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[1] Plaintiff alleges that an unnamed carrier "who spoke [Manoj Pandya's] same foreign language" received more favorable treatment. (Compl. at 5; *see also* DeLon Dep. at 124, 133.)

[2] Even if a claim for national origin were cognizable under Section 1981, Plaintiff's

Moreover, to the extent that Plaintiff has alleged *race* discrimination, the statute of limitations bars relief for certain alleged conduct. The statute of limitations for claims brought under Section 1981 is four year. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *White v. BFI Waste Srv.*, LLC, 375 F.3d 288 (4th Cir. 2004). Plaintiff cites acts of discrimination, harassment and/or retaliation occurring at various times between 1992 and 2004. Each individual incident is a discrete act that is subject to the four-year statue of limitations. *See Williams v. Giant Food, Inc.*, of *Am.*, 457 F. Supp. 2d

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claim would fail at the summary judgment stage. Plaintiff testified that in 1994, Pandya attempted to force DeLon out in order to bring a social acquaintance on board, and that the acquaintance shared Pandya's national origin (from India). (DeLon Dep. at 124.) The claim is time-barred and, in any event, is not supported by sufficient evidence even to create a triable issue.

596, 608 (M.D.N.C. 2006). Because Plaintiff waited until March 23, 2005 to file this action, claims for any alleged conduct by Defendant (or imputable to Defendant) that occurred prior to March 23, 2001 are time barred.

To the extent that Plaintiff has timely claims under Section 1981, such as the discrimination/retaliation he alleges in connection with his 2004 termination and/or any alleged harassment occurring after March 23, 2001, Plaintiff unable to point to sufficient evidence to create a triable issue of fact. Plaintiff alleges three types of discrimination: disparate treatment, hostile work environment and retaliation. The *McDonnell Douglas* burden-shifting scheme applies to claims of disparate treatment where, as here, the plaintiff presents no direct evidence of intentional discrimination. *Causey v. Balog,* 162 F.3d 795, 804 (4th Cir. 1998). Under the McDonnell Douglas

scheme, a plaintiff who alleges race discrimination must show that (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) he was performing his job duties at a level that met the employer's legitimate expectations at the time of the adverse employment action; and (4) he was treated differently from similarly situated individuals outside the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994). Once a *prima facie* case is presented, the defendant must articulate some legitimate nondiscriminatory reason for the disparate treatment. *Id.* The articulated nondiscriminatory explanation is "presumptively valid," and the plaintiff must then demonstrate that the explanation is pretextual and "meet[s] the ultimate burden of proving intentional discrimination" by a preponderance of

the evidence. *Moore v. City of Charlotte*, 754 F.2d 1100, 1106 (4th Cir. 1985).

Plaintiff cannot satisfy his *prima facie* case because he cannot show any adverse action taken against him because of his race. In his Complaint, Plaintiff alleges that an unnamed "white female" carrier was treated more favorably than he was. (Compl. at 8.) In his disposition, Plaintiff testified that he was required to take on a portion of the unnamed white female carrier's route against his wishes sometime between 2002 and 2004, but could not identify any specific carriers who received more favorable treatment. (DeLon Dep. at 157-58, 160-63.) Plaintiff subsequently served unverified written responses to Defendant's second set of discovery request identifying Laurel Urton as the white carrier about whom he testified in deposition. However, the uncontroverted evidence shows that Ms. Urton worked in a different

district, under a different district manager than Plaintiff. (Puryear Aff. ¶ 28; Pandya Decl. ¶ 14). Ms. Urton is not a proper comparator for purposes of Plaintiff's *prima facie* case. *See, e.g., Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

Moreover, Plaintiff offers insufficient evidence that Ms. Urton received more favorable treatment than Plaintiff or that Plaintiff otherwise suffered what could be characterized as an adverse employment action. To the contrary, the uncontroverted evidence shows that Defendant provided Plaintiff with a higher route allowance than Ms. Urton and that Plaintiff's credit balance checks were on average $200 more than Ms. Urton's checks. (Puryear Aff. ¶ 29.)

Asked what evidence he had to support of his claim, Plaintiff testified:

> Well, I'm black ... and I don't think that he was treating me the way he was treating the whites nor his own national origin. So, I don't know what else I can say.
>
> You know, I mean ... that's what discrimination is, is being treated different than others. Now, race, I'm black. I mean, that's in the record. That's what they say needs to happen, that you need to be of a protected race, and I'm a member of a protected race. I come out of slavery.

(DeLon Dep. at 213, 124.) Plaintiff's simply being a member of a protected class does not give rise to an actionable claim of race discrimination. *See, e.g., Autry v. N.C. Dep't of Human Res.*, 820 F.2d 1384, 1386 (4th Cir. 1994) ("[Plaintiff] would have to show that she was not promoted because of her race, not that she was a member of the black race and was not promoted."). Plaintiff's

speculation and beliefs that he was discriminated against, without evidence, do not raise genuine issues of material fact. *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir. 1994); *Ross v. Comm'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985) ("unsupported allegations as to motive do not confer talismanic immunity from Rule 56.") Defendant is entitled to summary judgment on Plaintiff's claim for disparate treatment.

Plaintiff also alleges that he suffered a racially hostile work environment between 1992 and 2004. To establish a claim for hostile work environment, Plaintiff must show that (1) the harassment was unwelcome; (2) the harassment was based on his race; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *See Hartsell v. Duplex*

Prods., Inc., 123 F.3d 766, 772 (4th Cir. 1997).

Plaintiff has offered insufficient evidence that he was subject to harassing conduct that was severe or pervasive enough to establish a claim for hostile work environment or that such conduct was racially motivated. In deposition, Plaintiff testified that Pandya contacted Plaintiff at home to discuss Plaintiff's untimely paper deliveries and assigned Plaintiff more customers than other carriers. (DeLon Dep. at 134-35, 177, 184-86, 196-97). Plaintiff's own deposition testimony belies any dispute about the severity or pervasiveness of the alleged harassment. No reasonable trier of fact could find the alleged conduct actionable. Defendant is entitled to summary judgment on Plaintiff's hostile work environment claim.

Finally, Plaintiff alleges that Defendant's implementation of the new agreement for all its carriers in January 2004 and the termination of

his job in March 2004 upon his decision not to sign the new agreement were actions taken in retaliation for Plaintiff's protected activity. (Comp. at 11.) To show the type of retaliation prohibited by Section 1981, a plaintiff must establish that (1) he engaged in protected activity; (2) the employer took an adverse employment action against him; and (3) a causal connection exists between the protected activity and the adverse action.

Defendant contends that Plaintiff has failed to produce sufficient evidence that he engaged in "protected activity" or that Defendant's conduct with regard to the dealer agreement was because of that activity. Plaintiff's testimony establishes that he made nothing more than general complaints about "unfair treatment" between 1992 and 2003. Plaintiff admits that he was "always complaining" but fails to identify any *actionable* protected activity. General

complaints do not qualify as "protected activity" under Section 1981. *Phillips v. Mabe*, 367 F. Supp. 2d 861, 869-70 (M.D.N.C. 2005) (a retaliation claim "must be based on opposition to conduct that is itself a violation of § 1981."). Moreover, even if Plaintiff's ongoing complaints were construed as protected activity, he has produced no evidence demonstrating a causal connection between the protected activity and termination of his agreement in 2004.

The alleged protected activity dates back to 1992 and spans 12 years, according to Plaintiff's own testimony. (DeLon Dep. at 182, 224.) In addition to the absence of temporal proximity between Plaintiff's complaints and the change in the contract terms in 2004, the uncontroverted evidence is that Defendant implemented a new independent contractor agreement for all of its carriers, not just Plaintiff, and all carriers were noticed that their old agreements would terminate.

Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

Conclusion

For the foregoing reasons, **IT IS RECOMMENDED** that the motion for summary judgment filed by Defendant News & Observer (Pleading No. 53) be granted and that this case be dismissed with prejudice.

/s/ P. Trevor Sharp
United States Magistrate Judge

Date: November 5, 2007

UNITED STATES COURT OF APPEARS
FOR THE FOURTH CIRCUIT

FILED
February 15, 2007

No. 06-1936
1:05-cv-00259-WLO

WELBON A. DELON
Plaintiff – Appellant

v.

THE NEWS AND OBSERVER PUBLISHING COMPANY OF RALEIGH, NORTH CAROLINA, a McClatchy Newspaper
Defendant – Appellee

ORDER

Appellant has filed an untimely petition for rehearing and rehearing en banc. This Court strictly enforces

the time limits for filing petitions for rehearing and rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc as untimely filed.

For the Court,

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WELBON A. DELON,
Plaintiff,

v. **1:05CV00259**

THE NEWS AND OBSERVER PUBLISHING COMPANY OF RALEIGH,

NORTH CAROLINA, A McClatchy Newspaper,

Defendant.

ORDER

OSTEEN, District Judge

In this Standing Order 30 proceeding, the Magistrate Judge has recommended that Defendant's motion to dismiss be granted and that Plaintiff's claim under Title VII be dismissed with prejudice. Plaintiff filed a timely objection to the recommendation. Defendant filed a response in opposition to Plaintiff's objection and Plaintiff filed a response in opposition to Defendant's response.

This court has conducted a review of the file and has determined that the recommendation of the Magistrate Judge is appropriate and should be adopted.

For the reasons set forth in the Magistrate Judge's recommendation of May 15, 2006,

IT IS ORDERED that Defendant's motion to dismiss (Doc. No. 4) is GRANTED and that Plaintiff's claim under Title VII is dismissed with prejudice.

This the 28th day of July 2006.

/s/WILLIAM L. OSTEEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WELBON A. DELON,
Plaintiff,

v. 1:05CV00259

THE NEWS AND OBSERVER PUBLISHING COMPANY OF RALEIGH, NORTH CAROLA, A McClatchy Newspaper,
Defendant.

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the motion to dismiss filed by Defendant the News and Observer Publishing Company of Raleigh, North Carolina, A McClatchy Newspaper ("News & Observer"). (Pleading No. 4) Plaintiff Welbon A. DeLon has opposed the motion and has filed a motion to amend his Complaint. (Pleading No. 17.) The News & Observer has responded to Plaintiff's motion to amend and to Plaintiff's opposition to

the motion to dismiss. The motions are ready for a ruling.

Procedural History

Plaintiff, acting *pro se*, filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission ("the EEOC") on December 7, 2004, claiming that the News & Observer discriminated against him from November 1993 to March 31, 2004. The EEOC issued a Dismissal and Notice of Rights dated December 23, 2004, finding that Plaintiff failed to file his Charge of Discrimination within the administrative period specified by Title VII. Plaintiff filed the Complaint in this matter on March 23, 2005, alleging that the News & Observer discriminated against him based on his race or national origin, in violation of the Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

On April 18, 2005, Defendant moved to dismiss the Complaint pursuant to Rules 12(b) (1), 12(b) (6)

of the Federal Rules of Civil Procedure, based on insufficient service of process, lack of subject matter jurisdiction and failure to state a claim. The primary argument for dismissal of Plaintiff's Title VII claim was that Plaintiff failed to file a charge with the EEOC within the required 180-day period. On May 20, 2005, Defendant withdrew its motion to dismiss to the extent that it was based on insufficient service of process. On June 8, 2005, Plaintiff opposed the motion to dismiss.

The Court held an initial pretrial conference on June 27, 2005 and entered an Initial Pretrial Conference Memorandum and Order dated June 30, 2005, allowing the parties to conduct limited discovery on the issue of the timeliness of Plaintiff's charge of discrimination. The Court advised that it would convert the motion to dismiss to a motion for summary judgment, and set deadlines for the filing of supplemental motions: Defendant, on

April 18, 2005, filed a supplemental memorandum in support of its motion to dismiss Plaintiff's Title VII claims.

Statement of Facts

Plaintiff Welbon A. DeLon delivered newspapers for Defendant News & Observer. The News & Observer terminated its relationship with Plaintiff on or about March 3, 2004, effective March 31, 2004. On May 6, 2004, Plaintiff submitted a precharge questionnaire to the EEOC. (Pleading No. 15, Def.'s Supplement Mem. in Supp. of its Mot. to Dismiss,Ex. B.) On its face, the precharge questionnaire advises that it is not a charge of discrimination and states that "[a] charge of discrimination must be filed with the time limits imposed by the statutes." *Id.* The questionnaire further advises that its purpose is simply to "assist [the charging party] in firing a charge of discrimination." *Id.*

On September 25, 2004, Plaintiff wrote a letter to the EEOC, indicating

and national origin discrimination letter made no mention of any previously filed charge of discrimination. *Id.* In response, the Raleigh District Office of the EEOC notified Plaintiff in writing that the information he submitted was insufficient to represent a charge and that his complaint was untimely. *Id.*, Ex. D. Subsequently, the EEOC made several unsuccessful attempts to obtain additional information from Plaintiff. *Id.*, Exs. E-I. On December 7, 2004, Plaintiff filed a charge of discrimination, alleging race and national origin discrimination and retaliation in connection with his March 3, 2004 termination. *Id.*, Ex. A.

On December 23, 2004, the EEOC dismissed Plaintiff's charge of discrimination and issued a notice of rights finding that Plaintiff's charge was not timely filed. *Id.*, Ex. J.

Discussion

In order to assert a Title VII claim in federal court, a plaintiff must

first exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *See Taylor v. Virginia Union Univ.*,193 F.3d 219, 239 (4th Cir. 1999). *See* 42 U.S.C. § 2000e-5(e) (1). The timing requirements in § 2000(e) (1) function similarly to a statute of limitations, and failure to file a charge within 180 days of the alleged unlawful employment practice warrants dismissal of the claim. *See Zipes v.Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Edelman v. Lynchburg Coll.*, 228 F.3d 503, 511-12(4th Cir. 2000),*rev'd on other grounds*,535 U.S.106(2002); *Clement v. UNC Hosps.*,No. 1:02CV1017, 2004 WL444567 at*2(M.D.N.C.Feb 26, 2004).

It is undisputed that the allegedly discriminatory conduct occurred on or before March 3, 2004. In order to satisfy the administrative statute of limitations, Plaintiff must have filed a charge with the EEOC on or before August 30, 2004. *See Martin*

v. SW Virginia Gas Co., 135 F.3d 307, 310 (4th Cir. 1998)(holding plaintiff's cause of action accrued on the date he received notice of his termination, though it was not to take effect until 3 months later). The record reflects that Plaintiff did not file an official charge with the EEOC until December 7, 2004, 279 days after the alleged discriminatory conduct.

Plaintiff argues that the Court should treat his filing of the intake questionnaire as a charge, making his claim timely. Although a defective charge filed during the administrative statute of limitations may be amended outside the period in order to cure technical defects or omissions, *see* 29 C.F.R. § 1601.12(b), this principle applies only when the earlier filing actually operates as a charge. *See Edelman*, 535 U.S. at 109-110, 118-19. The Fourth Circuit has not resolved the precise issue before this Court – whether a questionnaire itself may

represent as a charge.[1] The Seventh, Eighth and Eleventh Circuits employ a totality of the circumstances standard to determine whether a questionnaire qualifies as a charge. *See Wilkerson v. Grinnell Corp.*, 270 F.3d 1314(11th Cir.2001); *Lawrence v. Cooper Cmtys, Inc.*, 132 F.3d 447(8th Cir. 1998); *Philbin v. Gen. Elec. Capital Auto Lease, Inc.*,929 F.2d 321, 324(7thCir.1991); *Hollon v. Louisiana Pac. Corp.*, No. Civ. A 9:04-CV-183, 2005 WL 1398711, at *3 (E.D. Tex. 2005). Relevant facts include (1) what Plaintiff and EEOC personnel said to each other; (2) what the questionnaire indicated; and (3) how the EEOC responded to the questionnaire. *See Wilkerson*, 270 F.3d at 1320.

In this case, the questionnaire clearly stated that it was a *precharge*

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[1] The dispositive issue here is not the effect of the verification of Plaintiff's precharge questionnaire, or the effect of any subsequent filing on the questionnaire, but relates instead to whether Plaintiff or the EEOC treated the precharge questionnaire as charge of discrimination. That issue was expressly reserved by the *Edelman* court. *See 535* U.S. at 118-19.

questionnaire and cautioned that a separate charge of discrimination must be filed. The questionnaire does not suggest in any fashion that failure to file a separate charge could result in the questionnaire, standing alone, convert it to a charge. Plaintiff offers no evidence concerning discussions between himself and EEOC personnel. There is no evidence to suggest that the EEOC or Plaintiff himself in *fact* viewed the questionnaire as a charge. Indeed, Plaintiff wrote a letter to the EEOC dated September 25, 2004 indicating that this *letter* was meant to be the charge. (Pleading No. 15, Ex. C ("This is to file a charge. . . .").) Plaintiff points to no evidence demonstrating that the EEOC misled him in any way. The questionnaire in this case cannot be considered a valid substitution for a charge for purposes of satisfying the exhaustion requirement.

In addition to opposing Defendant's motion to dismiss,

Plaintiff has moved to amend his Complaint. Plaintiff's motion to amend essentially repeats the arguments he makes in opposition to summary judgment, and does nothing to cure the defeat in his Title VII claim.

Conclusion

For the reasons stated above, **IT IS RECOMMENDED** that Defendant's motion to dismiss (Pleading No. 4) be granted and that Plaintiff's claim in this action under Title VII be dismissed with prejudice.

IT IS ORDERED that Plaintiff's motion to amend (Pleading No. 17) is **DENIED**.

IT IS FURTHER ORDERED that the parties may have until August 30, 2006, to conduct discovery on Plaintiff's claim under 42 U.S.C. § 1981. *See* Complaint at 6.

Dispositive motions are due October 2, 2006.

/s/P. Trevor Sharp

United States Magistrate Judge

Date: May 15, 2006